

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

The Administrative Law Judge awarded claimant permanent partial disability for an 11.5 percent whole body functional impairment. Respondent and its insurance carrier requested the Appeals Board to review the issue of timely notice of accident. That is the only issue now before the Appeals Board on this review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The Award entered by the Administrative Law Judge should be affirmed.

K.S.A. 44-520a provides that a worker must provide the employer notice of accident within ten days of its occurrence unless the worker can establish just cause for failing to do so which then extends the notice period to 75 days.

The Appeals Board agrees with the Administrative Law Judge that claimant has established just cause in failing to give respondent notice of accident within ten days of its occurrence. At the time of the incident on December 13, 1994, claimant believed he had experienced a minor shoulder muscle strain which would resolve in due course without medical intervention. However, over the next several days as he continued to work, claimant's symptoms progressively worsened to the extent that he ultimately sought medical treatment from his personal physician on Saturday, December 24, 1994. Because of the Christmas holidays, respondent was closed on Monday, December 26. Claimant telephoned work on Tuesday, December 27, and left a message on an answering machine that he hurt his shoulder and would try to come to work the next day. On the following day, December 28, 1994, claimant spoke with his supervisor and the human resources manager and advised he thought he hurt himself on December 13, 1994, while pushing open a gate to unload a railcar.

The Appeals Board finds claimant was not aware that he was required to report his work injuries within ten days of their occurrence or risk losing the right to obtain workers compensation benefits. That conclusion is supported by claimant's testimony, as well as by respondent's human resources manager, Byron Harper, who testified he did not tell respondent's employees about the ten-day notice rule at the company's safety meetings. In addition, the official state forms posted on respondent's premises likewise failed to notify readers of the ten-day notice rule.

Common sense dictates that a worker is not expected to report every minor ache and pain that is encountered on and off the job. As a practical matter, employers would frown upon employees who did. Under the facts presented, the Appeals Board finds claimant was unaware of the ten-day notice reporting rule, unaware that he would require any medical treatment, and unaware that he was suffering from anything more than minor

aches and pains. Based upon those findings, claimant has established just cause in failing to notify respondent within ten days of the date of accident. Therefore, because notice of accident was provided to respondent within 75 days of the December 13, 1994, incident, the Appeals Board finds timely notice was given under K.S.A. 44-520.

The Appeals Board hereby adopts the findings and conclusions set forth by the Administrative Law Judge in the Award to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated July 31, 1996, entered by Administrative Law Judge Alvin E. Witwer, should be, and hereby is, affirmed.

IT IS SO ORDERED.

Dated this ____ day of February 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dennis J. Reynolds, Lenexa, KS
Mark E. Kolich, Kansas City, KS
Alvin E. Witwer, Administrative Law Judge
Philip S. Harness, Director